FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL., PETITIONERS

v.

MARIE MANHART, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether an employer's policy of deducting greater amounts from the wages of its female employees than its male employees in return for the contingent future right to an equal monthly retirement allowance constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Congress has assigned to the Equal Employment Opportunity Commission, the Department of Justice, and

the Civil Service Commission the responsibility for federal enforcement of Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission may bring civil actions against private employers under 42 U.S.C. (Supp. V) 2000e–5(f)(1). The Attorney General has enforcement responsibility when the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e–6. The Civil Service Commission exerts oversight responsibility to insure nondiscrimination in federal employment and serves as the administrative reviewing authority for Title VII charges filed by individual employees against federal agencies. 42 U.S.C. (Supp. V) 2000e–16. Federal enforcement of the Equal Pay Act is assigned to the Secretary of Labor. 29 U.S.C. 206(d).

STATEMENT

This suit was filed as a class action on behalf of female employees and retirees of the City of Los Angeles, Department of Water and Power ("the Department") [1] alleging that the Department's Employees' Retirement, Disability, and Death Benefit Insurance Plan [hereinafter "the Plan"] discriminated against women in violation of Title VII of the Civil

[1] In addition to the Department of Water and Power, respondents sued the Members of the Board of Commissioners of the Department, the Members of the Board of Administration of the Department's Employees' Retirement, Disability and Death Benefit Insurance Plan, the Department's chief accounting officer, and the Department's general manager (Pet. App. C–2).

Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.*[2]

The Department's plan covers most of its approximately 12,000 employees, of whom approximately 2,000 are women (Pet. App. B–9; A. 15). Participation by all eligible employees is compulsory (Pet. App. C–2). The plan is entirely funded by monthly contributions from the employees, supplemental contributions from the Department, and earnings on those contributions. No commercial insurance company is involved in the administration of the plan.

Under the plan a male and female employee of the same age, length of service, and salary, receive an identical monthly allowance upon retirement (Pet. App. B–10).[3] However, in return for these contingent equal monthly benefits, the female employee was required until December 31, 1974, to make contributions to the plan which were 14.84 percent greater than those of an equivalent male employee (Pet. App. C–2). For example, employee Joan E. Roberts contributed a total (including earnings) of $18,670.59 to the Plan (R. 176). A similarly situated male employee would have

[2] Plaintiffs also alleged violations of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. 1983, the Fourteenth Amendment to the Constitution, and Article 1, Sections 1 and 21 of the Constitution of the State of California.

[3] Although the Department's plan does not appear in the record, such pension plans universally make the vesting of a pension contingent upon a number of factors including a minimum term of service. For statistics indicating the impact of such contingencies on the probability that males and females will obtain vested pension rights, see note 18, *infra*.

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contributed $13,274.55 (*ibid.*). The stated justification for requiring substantially differing contributions based upon the sex of the employee was that "[s]ound actuarial practice requires that annuity or pension plans be based on averaging of life expectancies of persons in ascertained classes (usually age and sex) since the life expectancy of a specific person cannot be predetermined" (A. 83).

Prior to the district court's decision the Department discontinued its use of higher contribution rates for female employees pursuant to California Government Code § 7500 (West, 1977 Cum. Supp.), which made it unlawful after January 1, 1975, for certain municipal agencies to require differing employee contributions based upon sex. The current retirement plan operates with equal monthly employee contributions and equal monthly benefits for similarly situated male and female employees (A. 102).

Respondents continued the litigation seeking restitution of the excess contributions made by female employees over the course of the preceding 2½ years, and successfully moved for summary judgment in the district court which held that basing employee contribution rates upon sex alone violates Title VII. The district court enjoined the Department from charging women a higher contribution rate, and awarded a refund to the women of all excess contributions between April 5, 1972, and December 31, 1974 (A. 134–135). The court of appeals affirmed (Pet. App. C), holding that the sex-based contribution schedule requiring increased payments by individual females, based upon the longevity of females as a group,[4] "is just the kind of abstract generalization, applied to individual women because of their being women, which Title VII was designed to abolish" (Pet. App. C–7). The court of appeals also held that a classification based explicitly and exclusively on sex[5] was not necessary to provide a financially sound pension plan, and noted that "distinctions based on many other longevity factors (*e.g.*, smoking and drinking habits, normality of weight, prior medical history, family longevity history) are not used [by the employer] in determining contribution levels" (Pet. App. C–11 to C–12).

Subsequently, the court of appeals, with one judge dissenting,[6] denied the Department's petition for rehearing (Pet. App. D), finding that unlike the exclusion of pregnancy from disability benefits (see *General Electric Co.* v. *Gilbert*, 429 U.S. 125) the differ-

[4] Calculations based upon Greenlee and Keh, "The 1971 Group Annuity Mortality Table," 23 *Transactions, Society of Actuaries*, Pt. 1, pp. 585–596 (1972), for example, show that women at age 65 on average will live 4.1 years longer than men at age 65.

[5] "[I]t does not seem reasonable to us to say that an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on" (Pet. App. C–13).

[6] Judge Kilkenny, who had joined the original opinion, dissented from the denial of rehearing on the ground that the *General Electric* decision required, at a minimum, a trial on the issue of whether the "retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females" (Pet. App. D–4 to D–9).

ential treatment of women in the Department's retirement plan was explicitly and exclusively based on gender.[7] The court explained (Pet. App. D–2):

> A greater amount is deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words.

SUMMARY OF ARGUMENT

I

A. Petitioners' mandatory retirement allowance plan under which a "greater amount [was] deducted from the wages of every woman employee than from the wages of every man employee whose rate of pay [was] the same" discriminated "on the basis of sex alone" (Pet. App. D–2). One of the factors that an employer appropriately considers in funding a pension plan is the estimated longevity of his workforce, and sex is one factor relevant to longevity predictions. But petitioners not only separately determined

[7] The court also noted that unlike the under-inclusive disability benefits plan in *General Electric* the retirement plan is all-inclusive as to retirement benefits, but "it is discriminatory, on the basis of sex alone, as to costs to the employees" (Pet. App. D–2).

the longevity risks for male and female employees, but also allocated the total cost of the employee pension plan according to a solely sex-based classification. As the court of appeals concluded "[t]o say that the difference [in wage deductions] is not based on sex is to play with words" (Pet. App. D–2).

B. Explicit sex discrimination in the terms and conditions of employment is prohibited by Title VII of the Civil Rights Act of 1964 even if based on accurate generalizations concerning men and women as a class. 42 U.S.C. 2000e–2(a)(1), 42 U.S.C. (Supp. V) 2000e–2(a)(2). See *Dothard* v. *Rawlinson*, No. 76–422, decided June 27, 1977. The Title VII prohibition extends equally to discrimination in employment-related retirement plans based upon generalizations with respect to each sex, race, religion, or national origin. See *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040 (C.A. 4); *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90 (C.A. 3). Indeed, assessment of deductions from employee wages based upon generalizations related to the employee's sex "is just the kind of abstract generalization * * * which Title VII was designed to abolish" (Pet. App. C–7).

C. The burden of paying approximately 15 percent more in return for a contingent future right to equal monthly pension payments substantially and adversely affected the take-home wages of individual women. During the course of some wage earners' careers, this disparity translated into wage differences of several thousand dollars. The contingencies associated with

the vesting of pension rights and the fact that most women and men (more than 80 percent) die at the same age means that most of these women will never receive the benefits that are said to offset this disadvantage. Nevertheless, because a small percentage of women live longer, all women were required to pay more, solely because of their sex, to receive the same contingent right to future periodic benefits. Similarly, because an equally small percentage of men die young, all men were accorded the benefit of reduced pension contribution costs.

D. A distinction with respect to the terms and conditions of employment explicitly based on membership in a class protected by Title VII (such as sex), if it can be justified at all under Title VII, must be justified by proof that "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business" and that there are "available no acceptable alternative policies or practices which would * * * accomplish the business purpose * * * equally well with a lesser differential [discriminatory] impact." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (C.A. 4), certiorari dismissed, 404 U.S. 1006. The justification offered by petitioners for requiring differing contributions based upon sex was that "[s]ound actuarial practice requires * * * averaging of life expectancies of persons in ascertained classes (usually age and sex)" (A. 83).

The assessment of actuarial risk has traditionally been accomplished by reference to sex classes, but allocation of the cost by differential deductions from

employee wages based upon sex alone is "exceedingly rare" (Brief for the Society of Actuaries and the American Academy of Actuaries as Amici Curiae, p. 18). In addition, petitioners' plan has functioned without a sex-based cost allocation since 1975. The court of appeals therefore correctly held that petitioners could not show that differential contribution rates based upon sex were necessary to provide "a stable and secure pension program" (Pet. App. C–11). ,

Title VII does not mandate the actuarial mechanics of estimating the cost of ensuring employee risks, nor does it inhibit the use of all relevant actuarial data including the race or sex mix of a particular workforce in order to estimate total costs accurately. Nevertheless, sex-neutral actuarial tables that merge the differing life expectancies of men and women are an available and practical alternative. Merger of the risks of group members is valid as an actuarial matter. The differing life expectancies of smokers and non-smokers, for example, are curently merged in petitioners' actuarial tables, and a similar merger of the life experiences of black and white persons followed the abandonment of traditional race-based acutuarial tables by the life insurance industry. Sex-neutral tables do not assume that men and women have the same life expectancies. These tables reflect the impact of female longevity experience on the workforce and can be adjusted to reflect the female composition of a particular pension plan's employee group.

Irrespective of how the employer calculates the

total risk, Title VII precludes funding that risk by differential deductions from wages based upon a sex classification. An available alternative to a sex-based cost allocation is the system used by petitioners since 1975 under which all employees share equally the risk of the longer life expectancy of a small percentage of females and the shorter life expectancy of a small percentage of males, just as all of petitioners' employees share equally the life expectancy risks of smokers and non-smokers and black and white employees. Since plans that allocate costs by differential deductions from wages based upon sex are rare, the practical implications for employers of discontinuance of that method would be minimal. In sum, petitioners have offered no arguably adequate justification for denying female employees rights "based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted to influence the terms and conditions of an *individual's* employment" (Pet. App. C–21).

II

A. The Bennett Amendment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), incorporates the exceptions to the prohibitions of the Equal Pay Act into Title VII. *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 144. Petitioners argue that the fourth exception to the Equal Pay Act authorizing a wage "differential based on any other factor other than sex" insulates a practice of allocating pension

costs on the basis of sex irrespective of the Title VII prohibition (Pet. Br. 24). But, as the court of appeals stated, "it does not seem reasonable to us to say that an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on" (Pet. App. C–13).

B. Despite the plain meaning of the statutory language, petitioners claim that the purpose of the fourth exception was to permit overtly sex-based classifications (Pet. Br. 15). But the legislative reports accompanying the Equal Pay Act emphasize that Congress intended the fourth exception as an authorization basically limited to sex-neutral classifications, "among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded." H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963). That understanding is reflected in the Secretary of Labor's Interpretative Bulletin on the Equal Pay Act, which states that "[t]o group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act" (29 C.F.R. 800.151).

In litigation (*Wirtz* v. *Midwest Mfg. Corp.,* 58 CCH Lab. Cases. ¶ 32,070, 18 WH Cases 556 (S.D. Ill., devided August 9, 1968) and in an opinion letter (BNA Wage-Hour Manual 95:607), the Secretary of Labor has taken the position that the Equal Pay Act precludes

differential deductions from wages based upon sex irrespective of the alleged increased costs of providing benefits to females. This conclusion applies *a fortiori* to pension contributions, which afford many employees no concurrent protection or benefits but only a contingent future right to benefits.

C. Petitioners argue that the decision below conflicts with Section 800.116(d) of the Secretary of Labor's Interpretative Bulletin on the Equal Pay Act. That section suggests that a pension plan which paid greater benefits to one sex than another or under which an *employer* made unequal contributions based upon sex would not constitute an illegal wage differential. But Section 800.116(d), which is now under reconsideration by the Department of Labor, does not sanction, or even purport to address, petitioners' practice of requiring greater contributions from the wages of women *employees*, a practice explicitly forbidden by Section 800.151 of the same Interpretative Bulletin. No conflict exists, therefore, between the position of the Department of Labor and the Equal Employment Opportunity Commission with respect to the issues raised and decided in this case. Indeed, the language of the Equal Pay Act, its legislative history, and the consistent interpretation of the Department of Labor all lead to the conclusion that petitioners' sex-based wage differential does not fall within the claimed exception to the Equal Pay Act. That Act, therefore, did not authorize petitioners' explicitly sex-based wage distinction which, for the reasons stated in point I, *supra*, violated Title VII.

ARGUMENT

I

A POLICY OF DEDUCTING GREATER AMOUNTS FROM THE WAGES OF FEMALE EMPLOYEES THAN FROM THOSE OF MALE EMPLOYEES IN RETURN FOR A CONTINGENT FUTURE RIGHT AT AN EQUAL MONTHLY RETIREMENT ALLOWANCE VIOLATES TITLE VII

A. PETITIONERS' POLICY CONSTITUTED DISCRIMINATION BASED UPON SEX

Petitioners' retirement allowance plan classified employees into two contribution rate groups according to a single criterion, that of their sex. Although petitioners pay all similarly situated participants, male or female, the same monthly post retirement benefits, until December 31, 1974, they required women to make contributions to the retirement plan that were 14.84 percent greater than those required of males. The sole basis upon which the employee was assigned the lower or the higher contribution rate was the employee's sex. If a man, he paid the lower rate; if a woman, she paid the higher rate. This is an explicit gender-based classification. Its use for determining pension contributions violates Title VII, at least *prima facie* (see pp. 19–31, *infra*), because it discriminates against women on account of their sex in their compensation, terms and conditions of employment (Section 703(a)(1), 42 U.S.C. 2000e–2(a)(1)),[8] and because it is a

[8] Section 703(a)(1) of Title VII makes it an unlawful employment practice for an employer to "* * * discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *." 42 U.S.C. 2000e–2(a)(1).

classification based upon sex that adversely affects individual female employees (Section 703(a)(2), 42 U.S.C. (Supp. V) 2000e–2(a)(2)).[9]

Title VII bars unequal treatment of individual women and men based merely on stereotyped characterizations of the sexes. See, *e.g., Dothard* v. *Rawlinson*, No. 76–422, decided June 27, 1977, slip op. 12; *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (C.A. 7). Accordingly, the courts have consistently held that traits characteristic of the average person of one sex may not be used to justify employment decisions with respect to individual persons of that sex. For example, though it may generally be true that women as a class ("on the average") are less strong than men as a class, individual women may not be penalized by an employment decision excluding all women from a particular job requiring a particular degree of strength. *E.g., Rosenfeld* v. *Southern Pacific Company*, 444 F. 2d 1219 (CA. 9); *Bowe* v. *Colgate-Palmolive Comany*, 416 F. 2d 711 (C.A. 7). Similarly, an employer "cannot exclude *all* males [from the job of flight attendant] simply because *most* males may not perform adequately" (emphasis in original). *Diaz* v. *Pan American World Air-*

[9] Section 703(a)(2) of Title VII, 42 U.S.C. (Supp. V) 2000e–2(a)(2), states in relevant part that it shall be an unlawful employment practice for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *."

ways, Inc., 442 F. 2d 385, 388 (C.A. 5), certiorari denied, 404 U.S. 950.[10]

By analogous reasoning, explicit sex-based discrimination in retirement plans rationalized by statistically based generalizations concerning men and women also violates Title VII. It is unlawful to require women to retire earlier than men (*e.g., Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186 (C.A. 7), certiorari denied, 404 U.S. 939), or to pay smaller periodic benefits to men who retire early than to women who retire early. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1042–1043 (C.A. 4); *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90 (C.A. 3); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278, 285–288 (D. Conn.), reversed on other grounds, 427 U.S. 445. The same principles require that individual women not be penalized by requiring all women to make greater pension contributions than all men, even if it be generally true that women as a class ("on the average") live longer than men as a class. As the court of appeals stated, this "is

[10] The policy at issue here differs somewhat from the policies at issue in the cited cases in that, while it is generally possible to predict prior to hire, on the basis of objective tests, which women and men would be able to perform a particular job, it is more difficult and probably not feasible for group insurance purposes to predict even generally how long any individual will live. On the other hand, it is not necessary for purposes of a group pension plan to devise a method for determining with precision the probable life expectancy of each individual in the group (see *infra*, pp. 28–30).

just the kind of abstract generalization * * * which Title VII was designed to abolish" (Pet. App. C–7).[11]

[11] There is no reason to treat this distinction on account of sex any differently under Title VII than one based upon race, religion, or national origin. If it were lawful under Title VII to require women to contribute more to a pension fund than similarly situated men, because of their greater average longevity, then it would presumably also be lawful, for example, to require non-Jews to contribute more than Jews ("By age 65 * * * [Jewish] mortality rates were higher than those for the total population at age 65." Fauman and Mayer, "Jewish Mortality in the United States," in Shiloh and Selavan, *Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders*, Vol. I—The Jews, p. 36 (1973)); to differentiate between white and black employees (see Sutton, "Assessing Mortality and Morbidity Disadvantages of the Black Population of the United States," in Shiloh and Selavan, *Ethnic Groups of America: Their Morbidity, Mortality and Behavior Disorders*, Vol. II—The Blacks, p. 25 (1974)); or to require Mormons and Seventh Day Adventists to contribute more than persons of other religions ("* * * [T]he mortality rates for Mormons are substantially lower than those of the general population and similar to those of previously reported nonsmoking populations in the United States, including Seventh-day Adventists as a whole." Enstrom, "Cancer Mortality Among Mormons", 36 *Cancer* 825, 839 (1975) (footnotes omitted)).

In addition, although on the average women live longer than men, the relative differences in life expectancy vary from population to population. For example, while mortality data prepared by the State of California show that in the California population at large, women age 65–70 have a life expectancy 2.88 years greater than men of that age, similar data collected in the California Seventh Day Adventist (SDA) population show that California SDA women age 65–70 have a life expectancy only 1.55 years greater than California EDA men of that age. Lemon and Kuzma, "A Biologic Cost of Smoking," 18 *Archives of Environmental Health*, American Medical Association, 950, 952–953 (1969). The life expectancy of California SDA men even exceeds that of women in the California population at large until age 70 (*id.* at 953).

This burden of paying higher present contributions for a contingent future right to identical monthly pension payments substantially and adversely affects the wages of individual women. Although the female employee would receive precisely the same monthly retirement benefits as her male counterpart, she is required to pay approximately 15 percent more from her wages. During the course of a wage earner's career this disparity may translate into wage differences of several thousand dollars. Even among those who eventually qualify for a pension (see note 18, *infra*)[12] most women do not ever receive benefits that even arguably offset this wage disadvantage. Most men and women (more than 80 percent) die at the same age.[13] Petitioners' method of computing pen-

[12] With respect to those employees who will never qualify for a pension, the explicitly sex-based discrimination is more obvious. Even if the non-qualifying employees' contributions are returned to them at the time of their separation from employment, Title VII is violated by the deferment of a larger proportion of the compensation of women employees on the basis of their sex.

[13] More than 80 percent of men and women share common death ages. *Henderson* v. *State of Oregon*, 405 F. Supp. 1271, 1275 n. 5 (D. Ore.), appeal docketed, C.A. 9, No. 76–1706, March 30, 1976; *Reilly* v. *Robertson*, 360 N.E. 2d 171, 176 (Ind. Sup. Ct.), certiorari denied, No. 76–1635, October 3, 1977. This can be demonstrated using statistics attached to the Brief of the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund as Amici Curiae in this case (Addendum A). The figures used in Table I, "Survival Experience of 100,000 Males and 100,000 Females Retiring at Age 65, Using 1951 Group Annuity Mortality Table" have been used below to show the distribution of age at death for the 100,000 men and 100,000 women represented in the TIAA–CREF Table:

sion contributions on the basis of sex thus puts the burden of the higher annuity cost attributable to the approximately 14–20 percent of the women who die "late" on women exclusively, and assigns the cost savings resulting from the deaths of the approximately 14–20 percent of the men who die "early" exclusively to the men (see, also note 18, *infra*).[14]

Age	Number of deaths		Number of women who can be paired with men dying in the same year
	Men	Women	
66–70	14,188	8,087	8,087
71–75	18,656	13,339	13,339
76–80	21,914	19,525	19,525
81–85	21,132	21,949	21,132
86–90	14,477	18,791	14,477
91–95	6,959	12,029	6,959
96 and over	2,674	6,280	2,674
Total	100,000	100,000	86,193

Thus, out of the original group of 100,000 men and 100,000 women, approximately 86,193 men and 86,193 women can be paired as dying within the same five year age span. The overlap in the distributions therefore covers more than 85 percent of the total group. The difference in the average life expectancy of men and women results from the percentage of men who die "early," unmatched by women's deaths (in the example above, approximately 14 percent of the men), and the percentage of women who die "late," unmatched by men's deaths (in the example above, approximately 14 percent). Bergmann and Gray, "Equality in Retirement Benefits," *Civil Rights Digest* 25 (Fall 1975). The data used in the chart above are divided into five year intervals. Use of data divided into one year intervals would produce only slightly different results.

[14] Petitioners' statement (Pet. Br. 5) that "[t]he contributions by the Department for a woman were always greater than for a corresponding man," is incorrect. Petitioners' answers to interrogatories below show that in half of the cases described in the record, the Department would have contributed more to the pension plan in conjuction with the employment of a male than in conjuction with the employment of the similarly situated female (R. 176). This results from the fact that the Department's contribution to the pension fund in conjunction with a given employee consists not only of the accumulated 110 percent matching contributions but also of "minimum pension" contributions, as well as the amounts needed to fund survivor benefits under the plan (see, *e.g.*, R. 176, 238–239.

Nothing in this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, suggests that the imposition of these sex based burdens on employment is permissible under Title VII. In *Gilbert*, the Court found that the exclusion from a comprehensive disability plan of one physical condition with unique characteristics—pregnancy—did not, in itself, discriminate on the basis of sex. It considered the disability benefits plan as differentiating between pregnant women and all other nonpregnant persons, including nonpregnant women, *i.e.*, a distinction on a basis other than their sex.[15] By contrast, the pension plan here classified and distinguished between two groups of employees explicitly and exclusively on the basis of sex. "The high-

[15] Having found that the exclusion of pregnancy from the disability benefits plan was not *per se* gender-based discrimination, the Court analyzed the plan to determine whether, as a facially neutral plan, it had a gender-based discriminatory effect on one class, and found that it did not. 429 U.S. at 137–140. Here, this second inquiry into disparate impact is unnecessary because of the gender-based discriminatory nature of the pension plan. Even if inquiry into the effects of petitioners' pension system were necessary in this case, it is clear that here the burden placed upon female employees, with respect to their current compensation, is greater than that placed upon male employees. *Nashville Gas Co.* v. *Satty*, No. 75–536, decided December 6, 1977, slip op. 5. See *infra*, p. 36.

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er contribution is required specifically and only from women as distinguished from men" (Pet. App. D–2).[16]

B. PETITIONERS HAVE SUGGESTED NO ADEQUATE BASIS FOR AN AFFIRMATIVE DEFENSE UNDER TITLE VII

What we have said thus far is sufficient, in our view, to dispose of this case. Petitioners have sug-

[16] Judge Kilkenny, dissenting from the denial of the petition for rehearing, concluded that this case is governed by *General Electric Co.* v. *Gilbert* because "the plan is facially nondiscriminatory to the extent that there is no risk for which one sex is covered and the other is not" and that there was no showing of gender-based effects because "the aggregate risk protection for men and women is identical" (Pet. App. D–6). This analysis fails to appreciate that unlike the *Gilbert* plaintiffs, respondents here do not challenge the risk coverage of the pension plan, which is all inclusive with respect to the risks faced by males and females alike. Respondents' challenge is instead addressed to the explicitly sex-based differential in assessments against wages by which the Department's plan is financed. No similar issue was raised or considered in *Gilbert* (which involved neither a contribution surcharge for those employees desiring or requiring pregnancy insurance nor a sex-based differential in employee contributions).

Moreover, the aggregate analysis of class risks and benefits has no place in a case challenging explicit sex discrimination. Aggregate analysis may be a useful tool in demonstrating whether facially neutral plans in fact have a gender-based effect. See *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 138; *Nashville Gas Co.* v. *Satty*, *supra*, slip op. 8. However, this Court has never suggested that explicit discrimination on the basis of sex or race can be justified by a showing of offsetting benefits to the racial or sex class. Such a defense would be inconsistent with the overriding purpose of Title VII "to require employers to treat each employee * * * as an individual, and to make job related decisions about each employee on the basis of relevant individual characteristics, so that the employees' membership in a racial, ethnic, religious or sexual group is irrelevant to the decisions. *See Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 436" (Pet. App. C–7).

gested, however, that they can justify the practices at issue here by an affirmative defense analogous to a showing of business necessity (see A. 109–110, 116).

It is established under Title VII that practices which are neutral on their face, but which have a discriminatory effect on a class protected by Title VII, may be justified by the employer, as an affirmative defense, under the standards of business necessity applicable in Title VII cases. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431. In order to establish a "business necessity" defense, the employer must prove that "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business" and that there are "available no acceptable alternative policies or practices which would better accomplish the business purpose * * * or accomplish it equally well with a lesser differential [discriminatory] impact." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (C.A. 4), certiorari dismissed, 404 U.S. 1006; see *Dothard* v. *Rawlinson, supra,* slip op. 10 n. 14.

Because the practices at issue here are not neutral on their face, the business necessity justification does not apply. At most, petitioners might attempt to rely on an analogous affirmative defense designed to show that practices which appear discriminatory on their face are not in fact discriminatory. If such a defense for an explicitly sex-based (or race-based or religion-based) policy is to be entertained at all, it should be justified under standards at least as stringent as those

applicable to the business necessity defense, in order to avoid unnecessary approval of precisely the sort of differentiation by class characteristic that Title VII was designed to eliminate. See *Craig* v. *Boren*, 429 U.S. 190, 208–209 n. 22.[17]

Petitioners argue, and we do not dispute, that the financial planning of a pension program requires the use of actuarial averaging of the varying longevity experiences of ascertainable groups because it is impossible to determine in advance when any particular individual will die, and that actuarial grouping traditionally has been accomplished by reference to sex. Initially, however, we have difficulty in understanding how this can serve to justify sex-based differences in the take-home pay of employees who do not currently qualify, and a substantial number of whom may never qualify, for pension rights.[18] Unlike, for example, con-

[17] Cf. *Dothard* v. *Rawlinson*, *supra*, slip op. 12, holding that the parallel bona fide occupational qualification (BFOQ) defense to explicitly sex-based discrimination must be extremely narrowly construed. The BFOQ defense is inapplicable to the type of discrimination at issue here since, by its terms, BFOQ concerns only allegations that the particular sex discrimination in "occupations" (such as in hiring or job assignments) is justified because it is necessary to the conduct of the business to have an employee of a particular sex perform certain tasks. *Dothard* v. *Rawlinson*, *supra*, slip op. 11–12. While the court of appeals here discussed petitioners' proferred defense in terms of a BFOQ defense, its analysis is in substance that applicable to a business necessity defense (see Pet. App. C–10 to C–12).

[18] Indeed, while life expectancies are relevant to the estimate of pension plan costs, "[f]or any given schedule of benefits the actual costs of a plan depend principally upon the number of participants who achieve benefit eligibility." Bernstein, *The Future of Private*

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tributions for disability insurance or life insurance, the payment of pension contributions provides an employee who has not yet qualified for a pension with no present protection or benefit that could arguably be a co-existing offset to the burden of a sex-based reduction in current compensation. Moreover, since 1975 petitioners' plan has functioned, as most plans do (see p. 30, *infra*) without a sex-based contribution schedule. The court of appeals was therefore obviously correct in pointing out that while the use of sex as an actuarial class may assist pension administrators in predicting costs and benefits more accurately, that does not mean that "providing a financially sound pension plan requires [establishing contribution rates according to] an actuarial classification based wholly on sex" (Pet. App. C–11).

The analogous practice of utilizing racial criteria in assessing life insurance costs provides a useful reference for analyzing petitioners' proferred justification for sex-based distinctions. For years, it was customary for the insurance industry to use race-based actuarial criteria as the basis for charging blacks higher life

Pensions 39 (1964). One survey indicates that women, in general, who are covered by pension plans are less likely than men to have vested rights. Kolodrubetz and Landay, "Coverage and Vesting of Full-Time Employees Under Private Retirement Plans," *Social Security Bulletin* 20, 27 (November 1973). Among retiring workers in another survey, 46 percent of the men and only 21 percent of the women were entitled to pension benefits, and the median benefit for entitled women was only $970 per year, as compared to $2,080 for men. Kolodrubetz, "Private Retirement Benefits and Relationship to Earnings: Survey of New Beneficiaries," *Social Security Bulletin* 16 (May 1973).

insurance rate than whites. See, *e.g.*, James, *The Metropolitan Life: A Study in Business Growth* 338–339 (1976). This practice was defended as racially neutral and non-discriminatory because it was "dictated entirely by actuarial findings" (*id.* at 338).[19] The assessment of different life insurance rates for blacks and whites on the basis of race, though a valid choice as an actuarial matter, is now prohibited by state legislation (*ibid.*). Actuaries have noted the parallel between the industry experience with race-based and sex-based criteria:

> Federal government pressure via the EEOC for treating males and females in exactly the same way recalls to mind the fact that the government took a similar position some decades ago with respect to race and imposed a requirement that insurance companies charge exactly the same premiums for the same coverage irrespective of race, in spite of the fact that all the published mortality experience then available, including the mortality statistics published with every decennial census, indicated clearly that there were very significant differences in mortality rates and trends by race.[20]

[19] "Mortality studies * * * showed that the colored death rates were running substantially in excess of the white. It was clearly improper to continue writing both on the same premium rates. That would have been discrimination against the whites" (*id.* at 339).

[20] Fellers and Jackson, "Noninsured Pensioner Mortality: The UP–1984 Table," 25 *Proceedings, Conference of Actuaries in Public Practice* 456, 459 (1976). "UP–1984" stands for Unisex Pension—1984.

Similarly, actuarial tables based upon sex, while customarily used, can be replaced by alternative groupings that are equally valid as actuarial pools. Since neither segregation nor merger of life expectancy experience by sex is in itself actuarially unsound, at least with respect to group insurance,[21] the differing average life expectancies of women as a class and men as a class can be merged in calculating total

[21] Risk classification in group insurance differs significantly from risk classification in individual insurance. In the latter, the factors affecting the particular individual's risk are computed as precisely as possible. See Shepherd and Webster, *Selection of Risks* 6 (1957). But in group insurance, most of these different risks are pooled among all the participants.

Amici Teachers Insurance and Annuity Association of America and College Retirement Equities Fund argue that under a sex-neutral contribution scheme "the employer or insurer would be forced to take some of the funds contributed by and for the men and pay those funds to the women," and that "[t]his would be discriminatory in the extreme" (Br. 24). For reasons previously discussed, however, that argument is unpersuasive with respect to pension contribution differentials (which are all that is at issue here), which involve sex-based differences in take-home pay in return for a contingent future right to pension payments. Nor, in our view, do similar considerations mean that Title VII requires the level of periodic payments to pensioners under a plan to be differentiated according to sex. The essence of a group pension benefit plan, like group disability insurance coverage, is not that all covered individuals will receive proportional aggregate benefits, but that all participants are assured of benefits for their covered individual needs that actually arise. So long as a plan provides for the same level of benefits for all covered individuals, male or female, for as long as individually needed, it is consistent with Title VII. Title VII does not require differentials in either pension contribution levels or pension payment levels on the basis of sex, any more than it requires them on the basis of race or religion. See note 11, *supra*. See, also, notes 27, 33, *infra*.

pension risks. The use of merged life expectancy tables pools the risks of those groups with different mortality experiences whose risks are not separately calculated. In fact, numerous categories of risk are merged in any single classification actuarial table. For example, the different life expectancy experience of smokers and non-smokers is "merged" in petitioners' actuarial calculations.[22] Use of a merged, sex-neutral table involves a similar pooling, and "the use of mortality rates on a single 'unisex' basis has been found quite practical for non-insured plans." [23] Fellers and Jackson, *supra,* at 458.

Merging the longevity experiences of men and women does not require "resort to an assumption (women and men of the same age have equal life expectancy) that is demonstrably false" (Brief of Teachers Insurance and Annuity Association, p. 23). Sex-neutral tables reflect the impact of female longevity experience on the workforce and can be adjusted

[22] See *Chart Book on Smoking, Tobacco, and Health*, U.S. Department of Health, Education and Welfare, Public Health Service, Publication No. CDC 75–7511, p. 12 (revised 1972). If smokers and non-smokers receive the same periodic benefits in a merged group, the smokers make greater contributions and the non-smokers smaller contributions, than they would if their experience were segregated.

[23] Petitioners' pension program is a non-insured plan. See Brief for the Society of Actuaries, p. 5.

to reflect the female composition of a particular pension plan's employee group.[24] Title VII does not preclude the consideration of all relevant actuarial data including the sex or race mix of a particular workforce in order to estimate as accurately as possible the total cost of the pension plan. Actuaries themselves have recognized that the government "is not questioning the fact that differences in mortality rates for males and females have been observed in the

[24] Fellers and Jackson, who have developed a sex-neutral mortality table, have explained how it would function:

> The UP–1984 Table has been developed as a composite mortality table which, if used without adjustment, is appropriate for the valuation of pension plans covering groups having a 10-30 per cent female content. The table can be set forward one year in age for use with groups with less than 10 per cent female content, set back one year in age for groups having 30-50 per cent female content, and so on. The use of a composite table for the actuarial valuation of pension benefits should not be considered less accurate or less scientific than the use of sex-segregated mortality tables, because statistically significant data relative to the differentials by sex in pay-increase factors, early retirement rates, disability retirement rates, and rates of withdrawal from service generally are not available on a company-by-company or even an industry-wide basis. The costs of projected pensions must thus be based on so many estimates and assumptions that are not subject to accurate delineation by sex that the use of sex-segregated mortality rates is a refinement in the actuarial valuation process that is not justified on statistical or financial grounds.

Fellers and Jackson, *supra*, note 20, at 483–484.

past, nor that such differences must be considered in estimating costs for the future." [25]

Title VII does, however, preclude differential deductions from wages governed by a sex or race based allocation of the total cost of a pension plan. An obvious alternative is that used by petitioners since 1975—that employees share equally the risk of longer life expectancy by a small percentage of females and shorter life expectancy by a small percentage of males. The American Council of Life Insurance (Br. 44) argues that such equal sharing of risks by all employees "violate[s] the basic insurance concept * * * that only applicants who are exposed to comparable degrees of risk should be placed in the same premium class." Whatever the merits of that view as to individual insurance,[26] it is unpersuasive in the context

[25] Fellers and Jackson, *supra*, note 20, at 482. Thus we do not contest that the sex mix of a particular pensioner group may be considered in order to determine the total estimated cost of a pension plan. A plan with a pensioner population that is 90 percent female will ultimately have to pay out a greater amount of benefits than a plan with a pensioner population that is only 10 percent female. The same type of difference is true of a pensioner population that has 90 percent nonsmokers as compared to only 10 percent nonsmokers.

[26] The dissenting judge in the court of appeals thought it significant that a female who purchased an annuity as an individual from a commercial insurance company would have paid more than her male counterpart (Pet. App. D–7). However, the fact that private insurance companies make explicit sex based distinctions, as they once made explicit race based distinctions, in setting rates does not insulate employers who establish insurance programs from their obligations under Title VII. The commercial sale of insurance is not a term or condition of employment and therefore is not subject

of group insurance in which by definition costs are divided equally among group members, many of whom are differently situated. For example, under petitioners' plan the cost of longer average life expectancies of non-smokers is shared equally by smokers and non-smokers alike and both black and white employees share equally in the cost of longer average life expectancies of white employees. In any event, as the brief of the Society of Actuaries and the American Academy of Actuaries acknowledges, there are important exceptions to the concept of "actuarial equity," one of which is that "certain classifications which may be perfectly feasible from an actuarial standpoint may be barred by others for reasons of social policy" (Br. 11). Title VII represents a congressional policy decision that sex-based distinctions with respect to employment, however feasible, traditional or convenient, cannot (except in certain narrowly limited circumstances) be the basis of decisions with respect to wages and terms and conditions of employment.

The Brief Amicus Curiae of American Council of Life Insurance suggests that "[t]he decision below * * * will require radical changes in the pension and retirement coverage available to American workers" (Br. 42). Those fears are unsupportable. The decision below held only that employer self-insured pension plans cannot differentiate between men and women with

to the statutory prohibition in Title VII against race or sex discrimination. By contrast, the provision of insurance as an incident to employment does trigger the Title VII prohibition against discrimination on the basis of sex or race.

respect to deductions from wages. As the Brief for the Society of Actuaries and the American Academy of Actuaries as Amici Curiae notes (p. 18), "[m]ost defined benefit plans are noncontributory." As to the minority that require employee contributions, those contributions "are almost always—unlike the plan in the case at bar—unrelated to age or sex" (*ibid.*). The brief concludes, "[s]ince defined benefit plans which provide for different contribution rates for male and female employees are exceedingly rare, there would not be a widespread effect if equal employee contribution rates were to be required in the case at bar" (*ibid.*).

Tradition and ease of administration are therefore insufficient justification for the use of a prohibited criterion here, especially in light of the available nondiscriminatory option of utilizing general, sex-neutral actuarial tables that are of equal actuarial validity. Petitioners' discontinuance as of January 1, 1975, of its sex-based policy in favor of equal contribution rates for male and female employees belies any claim that its previous sex differentiated contribution rates were necessary to an actuarially sound pension plan. The courts below therefore properly found that petitioners' proffered justifications could not, in the circumstances of this case, show that differential contribution rates based exclusively on sex were essential to the "business function" of providing employees with "a stable and secure pension program" (Pet. App. C–11). Nor, for the reasons we have previously dis-

cussed, could petitioners show that its plan of unequal current takehome pay, in return for the possibility of a future right to equal periodic pension payments, was nondiscriminatory in operation. It was, accordingly, proper to grant summary judgment in favor of the respondents, and this Court should affirm the decision of the court of appeals, which correctly is "based upon the fundamental Title VII precept that generalizations relating to sex, race, religion, and national origin cannot be permitted to influence the terms and conditions of *an individual's* employment" (emphasis in original) (Pet. App. C–21, quoting EEOC Dec. No. 75–146, January 13, 1975, CCH Employment Practices Guide, ¶ 6447, p. 4191).[27]

[27] In 1966 the EEOC's General Counsel issued an opinion letter which, without particular reference to pension plans, can be read to approve generally the type of practice here. 401 F.E.P. Rep. 3011–3012. This was not a binding Commission opinion. See 35 Fed. Reg. 18692. The EEOC's position has evolved. The EEOC's original Sex Discrimination Guidelines primarily addressed the most obvious forms of sex-based discrimination and did not discuss retirement and pension plans. 30 Fed. Reg. 14926–14928. In 1968, the EEOC amended its Guidelines, referring formally for the first time to pension and retirement plans, stating specifically that a difference in optional or compulsory retirement ages based on sex violates Title VII, and, more generally, that "[o]ther differences based on sex, such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues." 33 Fed. Reg. 3344. The EEOC issued the present more detailed Sex Discrimination Guidelines in 1972. 37 Fed. Reg. 6835–6837. Those guidelines state that it is an unlawful employment practice for an employer to "discriminate between men and women with regard to fringe benefits," or to have a pension plan which "differentiates in benefits on the basis of sex" (29 C.F.R. 1604.9(b), (f)), and "[i]t shall not be a defense under title VIII [sic] to a charge

II

A REQUIREMENT THAT FEMALE EMPLOYEES CONTRIBUTE MORE TO A PENSION PLAN THAN SIMILARLY SITUATED MALE EMPLOYEES VIOLATES THE EQUAL PAY ACT

The Bennett Amendment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(h), incorporates the exceptions to the prohibitions of the Equal Pay Act into Title VII by authorizing wage differences if "such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act]."[28] The Equal Pay Act provides in pertinent part:

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of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other" (29 C.F.R. 1604.9 (e)).

In an area as complex as employment discrimination, evolving positions are to be expected. Congress recognized as much in acknowledging in 1972 that its perception of the nature of employment discrimination had evolved. S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 5 (1971). Even if the EEOC's 1972 guidelines on this matter did constitute a significant change in its interpretation, they are nevertheless entitled to great weight because they are based upon the Commission's "cumulative experience." *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 266; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349. See *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94; cf. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140–145.

[28] *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 144. Petitioners argue that a colloquy between Senators Randolph and Humphrey (cited by this Court in *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 144) during debate on Title VII demonstrates that Congress contemplated that the practice here at issue would be lawful under the Equal Pay Act. The exchange reads, in its entirety, as follows (110 Cong. Rec. 13663–13664 (1964)):

> Mr. RANDOLPH. Mr. President. I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?
>
> Mr. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.

Although this interchange is not without ambiguity, it appears to have been intended primarily as an assurance that the Equal Pay Act and its exemptions would be incorporated into Title VII. It does not purport to be a careful consideration of the meaning of the Equal Pay Act itself as it applies to industrial benefit plans. Since the interchange occurred one year after the passage of the Equal Pay Act, it would hardly be a reliable indication of Congress' intent in enacting that legislation. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n. 39. In fact, the social security provisions referred to by Senator Randolph were held unconstitutional in *Califano* v. *Goldfarb*, 430 U.S. 199; the retirement options (which do not constitute wage differentials) are not covered by the Equal Pay Act, and differential retirement ages have consistently been held unlawful (see cases cited, *supra*, at 15). At all events, the interchange makes no reference to sex-based distinctions in deductions from wages, and any attempt to read it as suggesting that such distinctions would be authorized would be inconsistent with the balance of the legislative history as we demonstrate herein.

> No employer * * * shall discriminate, within any establishment * * *, between employees on

> the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex * * *. [29 U.S.C. 206(d)(1).]

Petitioners argue that the fourth exception to the Equal Pay Act, allowing "a differential based on any other factor other than sex," permits a sex-based allocation of pension plan costs irrespective of what would otherwise be a Title VII violation (Pet. Br. 24). However, as the court of appeals stated (Pet. App. C–13):

> it does not seem reasonable to us to say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.

The legislative history of the Equal Pay Act as well as administrative interpretation by the Department of Labor support the conclusion drawn from the plain meaning of the statute that the fourth exception cannot be invoked to insulate petitioners' plan from Title VII scrutiny.

Congress' purpose in passing the Equal Pay Act was to "eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from [them]." *Shultz* v. *Wheaton Glass Company*, 421 F. 2d 259, 265 (C.A. 3); see also *Shultz* v. *American Can Company-Dixie Products*, 424 F. 2d 356, 360 (C.A. 8). See also Section 2(a) of the Equal Pay Act, 77 Stat. 56; Section 2(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. 202(a). As stated by Senator Hart during the debates on the equal pay bill (109 Cong. Rec. 8916 (1963)):

> Women are working to earn a living, to support families or to contribute to the family's ability to send the children to college—in addition to whatever personal sense of achievement may be involved. The supermarket does not have a special price on its groceries for women, the doctor does not have a special rate for them, their rent is not based on sex. Why then do we allow a pay differential to continue which gives them a smaller paycheck than others performing the same work?

A violation of the Equal Pay Act occurs if the take-home pay of members of one sex is less than that of members of the other sex, performing the same work regardless of whether they are paid the same basic salary. Payments made to satisfy the wage requirements set forth in Section 6 of the Fair Labor Standards Act, 29 U.S.C. 206 (which contains the Equal Pay Act, 29 U.S.C. 206(d)), must be "unconditional"—*i.e.*, they must be "free and clear", *Brennan* v. *Veterans Cleaning Service, Inc.*, 482 F. 2d 1362, 1369 (C.A. 5), and the employee must actually have use of the money. See, *e.g.*, *Shultz* v. *Hinojosa*,

432 F. 2d 259 (C.A. 5); *Veterans Cleaning Service, Inc., supra; Brennan* v. *Heard*, 491 F. 2d 1, 3–4 (C.A. 5). Here the women's wages were not "equal" to the men's since part of their wages had to be paid back in the form of an additional contribution to the pension plan.[29] The women thus had "unconditional" control of a smaller wage than the men; they had less money "to allocate * * * among competing economic and personal interests" (*Brennan* v. *Heard, supra,* 491 F. 2d at 4). Absent some exception, this unequal pay scheme would constitute a violation of the Equal Pay Act.

To justify an exemption for their unequal pay scheme from both the Equal Pay Act and Title VII, petitioners claim that the purpose of the exemption authorizing "a differential based on any other factor other than sex" (29 U.S.C. 206(d)(1)(iv)) was to permit overtly sex-based classifications (Br. 15), but the plain meaning of the language "other

[29] Even if it is assumed (since there is no record on this point) that a women terminating her employment with the petitioner employer could at that time withdraw her own contributions, which, because of the higher contribution required by the plan, would exceed the amounts accumulated by a similarly situated man, that would not cure the equal pay violation even with respect to such non-pensioners. The wages required by the Fair Labor Standards Act must be paid promptly (*Rigopoulos* v. *Kervan*, 140 F. 2d 506, 507 (C.A. 2)). The possible recoupment of a lump sum many months or years later does not satisfy the requirement of equal pay (cf. *Roland Electrical Co.* v. *Black*, 163 F. 2d 417, 421 (C.A. 4), certiorari denied, 333 U.S. 854); nor does it meet the Act's purpose of increasing the wages of women workers so that they can enjoy a better living standard. Money which may or may not be recouped at some later indefinite time does not pay bills or mortgage payments. *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 707–708 and n. 20.

than sex" is to preclude rather than permit sex-based pay decisions. Moreover, the reference to "any other factor" suggests by its terms that the first three sex-neutral exceptions, (1) seniority, (2) merit, and (3) quantity or quality of production, are examples. Congressman Griffin, a supporter of the Equal Pay Act, made that understanding explicit, stating "[r]oman numeral iv is a broad principle, and those preceding it are really examples" (109 Cong. Rec. 9203 (1963)).

The legislative reports emphasize that Congress intended the fourth exception as an authorization basically limited to sex-neutral classifications.[30] As reported by the Senate Committee on Labor and Public Welfare, the bill (S. 1409) provided one exception to the equal pay for equal work principle, "where such a wage differential is based on any factor or factors other than sex." The exception examples cited in the Committee Report make clear that the factors upon which the differential is based must relate to sex-neutral distinctions and not some generalization with respect to women as a whole. Thus "seniority systems are valid exceptions provided they are based on tenure and not upon sex," as is "a merit system or piecework system which measures either the quantity or quality of production or performance" (S. Rep. No. 176, 88th Cong., 1st Sess., p. 4 (1963)). The House Committee bill (H.R. 6060) contained the general exception contained in the Senate bill, as well as the three specific exceptions that now appear in the Act. The House

[30] The extremely narrow possible exception to this limitation is discussed *infra*, pp. 39–41.

Committee on Education and Labor also emphasized that its intent was to exempt sex-neutral distinctions (H.R. Rep. No. 309, 88th Cong., 1st Sess., p. 3 (1963)):

> [A]ny discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded.

Petitioners' claim (Br. 15) that the exception was intended to justify differential payments based upon a sex classification is totally inconsistent with this legislative history.[31] Supporters of the Equal Pay Act

[31] The dissenting judge below noted (Pet. App. D–8) that the Pension Benefit Guaranty Corporation (PBGC), which insures benefit plans under the Employee Retirement Income Security Act, had recognized the use of sex segregated actuarial tables in adopting interim regulations. The PBGC has used sex-based mortality tables to value benefits in order to relate its valuation rates to the anticipated actual cost of guaranteeing participants' pensions. 29 C.F.R. Part 2610, 41 Fed. Reg. 48484, 48489 (November 3, 1976). The PBGC has adopted final regulations for determining the maximum benefits guaranteed each participant under Title IV of ERISA (see 29 C.F.R. 2609.4); it there required the use of sex-neutral factors because "it felt that all participants of the same age should receive the same benefit protection from PBGC, regardless of the participant's sex in recognition of the similar needs of all retired workers" (41 Fed. Reg. 6194, 6195). Moreover, in providing in ERISA for the rights of participants in private pension plans to an accrued benefit derived from their own contributions, Congress required the annuity to be calculated on the basis of specified factors which do not include any reference to sex. See 29 U.S.C. (Supp. V) 1054(c)(2).

did indicate that Congress intended to permit a facially sex-neutral classification even if it had a statistically different effect on male and female workers. Congressman Griffin stated (109 Cong. Rec. 9206 (1963)):

> Some say that women are prone to absenteeism—some women may be and other women may not be prone to absenteeism. So long as the differential is made on the basis of such factors as absenteeism, or on the basis of time actually worked, and not on the basis of sex, then the wage differential will not violate this legislation.

But Congress never indicated that a statistical showing of the kind proferred by petitioners would justify an overtly sexual classification as a proper basis for a wage differential. See 29 C.F.R. 800.142–800.148.

Petitioners assert that both houses of Congress "considered longevity as a basis for adding the general exception to the Equal Pay Act" (Pet. Br. Exh. C–3, n. 2). The Senate Report did consider the problem posed by "the longer life span of women in pension benefits" (S. Rep. No. 176, *supra*, at 4) and appears to have recognized the possibility that upon a proper showing the Secretary "can permit an exception" based upon class-based costs (*ibid.*). That understanding is not reflected elsewhere in the legislative history. More importantly, the Senate Report emphasizes that any such wage differentials cannot be justified, as petitioners attempt to do here, by reference to a single item of cost, but only upon the basis of a

demonstration with respect to "all of the elements of the employment costs of both men and women" (*ibid.*).

The Senate Report states (S. Rep. No. 176, *supra*, at 4; emphasis added):

> During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men. * * * Some employers stated that the cost of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer life span of women in pension benefits.
>
> This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plantwide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.
>
> It is the intention of the committee that *where it can be shown that, on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential,* the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.

Thus, nothing in the legislative history of the Equal Pay Act indicates that wage differentials can be justified on the basis of average cost of a *single* item (*e.g.*, pension insurance) grouped by sex.

Petitioners seek support for a contrary view of the Act's requirement in Section 800.116(d) of the Secretary's Interpretative Bulletin (29 C.F.R. 800.116(d)). That Section provides that it shall not constitute an illegal wage differential for a pension plan to pay greater benefits to one sex than to the other if the *employer's* contributions are equal for men and women, and that the mere fact that the *employer* may make unequal contributions for employees of opposite sexes will not be considered to be an illegal wage differential if the resulting benefits are equal for similarly situated employees.[32] Section 800.116(d) does not

[32] The Interpretative Bulletin provides that:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and

sanction petitioners' practice of requiring greater contributions from the wages of their women *employees* in order to offset the average increased cost of their pension benefits.[33] The Secretary of Labor has never approved a practice of requiring female employees to make contributions to a pension plan which are larger than those required of similarly situated male employees. Indeed, the Secretary's Interpretative Bulletin on Equal Pay states in pertinent part that (29 C.F.R. 800.151; emphasis added):

> A wage differential based on claimed differences between the *average* cost of employing the employer's women workers as a group and

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women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees. [29 C.F.R. 800.116(d).]

[33] *Amici* have emphasized the conflict between the EEOC Guidelines and Section 800.116(d) of the Wage and Hour Administrator's Interpretative Bulletin. However, there is no conflict in this case since it is Section 800.151 (discussed in the text, *infra*), not 800.116(d), which is applicable to the practice at issue. Even though there is therefore no conflict for this Court to resolve in this case, we note that the EEOC Guidelines were amended in 1968 and 1972, after experience with Title VII of the Civil Rights Act, while the Wage-Hour interpretations were issued in 1965–1966 and have not been updated to reflect experience and judicial interpretations. The Department of Labor is currently reconsidering 29 C.F.R. 800.116(d).

> the *average* cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. *Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed,* because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibilty.

The Secretary of Labor has taken the same position in litigation. In *Wirtz* v. *Midwest Mfg. Corp.*, 58 CCH Lab Cases ¶ 32,070, 18 WH Cases 556 (S.D. Ill., decided August 9, 1968), the Secretary of Labor brought an Equal Pay Act suit to eliminate a sex-based wage differential. The company claimed that the differential was justified as "a factor other than sex" because of the additional cost required to provide its women employees equal unemployment compensation, workmen's compensation, and accident and health insurance. The court, in a consent decree filed by the parties, ruled that a wage differential based on

"claimed differences between the average cost of employing women employees *as a group* and the average cost of employing men employees *as a group* * * * does not qualify as a differential based on any 'other factor other than sex' " (Concl. of Law, 7, 18 WH Cases at 560–561; emphasis in original).

Finally, in an opinion letter dated June 18, 1964,[34] the Administrator of the Wage and Hour Division of the Department of Labor addressed the question whether an employer could maintain an hourly wage differential based on data showing that pension benefits, hospitalization and medical insurance, turnover costs and rest period benefits cost more per hour for woman than for men. The Administrator disapproved the wage differential, stating that the "factor other than sex" exception (29 U.S.C. 206(d)(1)(iv)) could not be claimed where the employer had analyzed only some but not "all of the elements of employment costs."

The issue involved in this case, in *Midwest Mfg. Corp.* and in the Administrator's opinion letter is basically the same—whether the asserted extra cost of providing female employees with pension or other benefits permits the employer to compensate women with lower take-home pay than similarly situated male employees.[35] The language of the Equal Pay Act, its

[34] The opinion letter is published in BNA Wage-Hour Manual 95:607.

[35] Indeed, the conclusion in the present case follows *a fortiori* from *Midwest* and the opinion letter because women employees here who have not yet qualified for a pension are receiving no concurrent protection or benefit in return for the reduction in their take-home pay.

legislative history and the consistent interpretation of the Department of Labor compel the conclusion that this practice does not fall within the exemptions to the Equal Pay Act. That Act, accordingly, did not authorize petitioners' plan which, for the reasons discussed in point I, *supra,* violated Title VII's prohibition of discrimination on the basis of sex.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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